UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

CARL CAVALIER	**CIVIL ACTION NO.: 3:21-cv-000656**
VERSUS	**JUDGE: JOHN W. DEGRAVELLES**
THE LOUISIANA DEPARTMENT OF PUBLIC SAFETY & CORRECTIONS, ET AL.	**MAGISTRATE JUDGE: RICHARD L. BOURGEOIS, JR.**

MEMORANDUM IN OPPOSITION TO INTERVENOR'S MOTION TO DEEM PRIVILEGE WAIVED

Plaintiff, Carl Cavalier ("Cavalier"), opposes Intervenor's Motion to deem attorney-client privilege waived (Rec. Doc. 77). Cavalier points out that the only relief sought thus far by Intervenor is the recognition and protection of its "lien and privilege by virtue of the written contingency fee agreement over the proceeds of settlement or amounts awarded."[1] Why such an extraordinary remedy is sought at this time by Intervenor is questionable given the limited relief it has thus far sought and the scope of the competing, underlying motions between plaintiff and defendants. In fact, Intervenor's Motion to Deem Privilege Waived predominately concerns itself with the merits of those competing motions, rather than the protection and recognition of its lien and privilege. Although the preamble to Intervenor's Motion claims it seeks to deem the privilege waived as to "certain, specified issues," its prayer for relief wields a much broader sword by seeking waiver "as to all of Mr. Cavalier's communications with Intervenor, through Ms. Craft and Mr. Conrad, including conversations, emails and text messages regarding authority to settle his claims and his agreement."[2]

[1] Record Doc. 62-2.
[2] Record Doc. 77 at pgs. 1, 7-8.

LAW AND ARGUMENT

A. FEDERAL JURISPRUDENCE

The first case relied upon by Jill L. Craft, Attorney at Law, LLC (hereinafter "JLC") is Conkling v. Turner, 883 F.2d 431, (5th Cir. 1989). There, the defendants had previously lost a motion for summary judgment urging the court to find that the petitioner's claim(s) were time barred. Arguing that the statute of limitations was tolled, plaintiff's statement, highly relevant to the issue before the court, was a claim in an affidavit opposing defendants' motion for summary judgment that he first learned statements regarding stock ownership made in 1963 by a seller were false when his prior attorney had informed him in 1984. Subsequently, the defendant sought to depose petitioner's current and former counsel concerning when petitioner knew or likely should have known of the misrepresentations made by the purported seller in the 1963 agreement.

The Court observed that

> The attorney-client privilege "was intended as a shield, not a sword." Pitney-Bowes, Inc. v. Mestre, 86 F.R.D. 444, 446 (S.D.Fla.1980). "When confidential communications are made a material issue in a judicial proceeding, fairness demands treating the defense as a waiver of the privilege." United States v. Mierzwicki, 500 F.Supp. 1331, 1335 (D.Md.1980). The great weight of authority holds that the attorney-client privilege is waived when a litigant "places information protected by it in issue through some affirmative act for his own benefit, and to allow the privilege to protect against disclosure of such information would be manifestly unfair to the opposing party." Hearn v. Rhay, 68 F.R.D. 574, 581 (E.D.Wash.1975); see also Armstrong v. United States, 440 F.2d 658 (5th Cir.1971); United States v. Exxon Corp., 94 F.R.D. 246 (D.D.C.1981); Russell v. Curtin Matheson Scientific, Inc., 493 F.Supp. 456 (S.D.Tex.1980); Pitney-Bowes, 86 F.R.D. 444; Mierzwicki, 500 F.Supp. 1331; Haymes v. Smith, 73 F.R.D. 572 (W.D.N.Y.1976); International Paper Co. v. Fibreboard Corp., 63 F.R.D. 88 (D.Del.1974). [3]

As petitioner had raised a claim upon which his assertion rested, namely that he only became aware

[3] *Conkling*, at 434.

that seller's 1963 representation to him that the seller was the owner of the stock he purchased was false when he was so advised by his counsel in 1985, the Court agreed with defendants that they were entitled to discovery on the issue as to whether petitioner knew or should have known four years prior to bringing suit of the representation's falsehood. This went to the very heart of whether the statute of limitations was tolled, or the action time barred.

In *Conkling*, the defense sought what information petitioner's former counsel relied upon, from any source, in advising Conkling that the 1963 ownership statement was untrue. Obviously, had all counsel's information come from the client, it would likely serve to increase the chances of success when re-urging the defense that the claim was time barred since the petitioner knew or should have known of the ownership claim's veracity well before receiving his attorney's opinion. The action brought by JLC seeks solely to recognize and protect its lien and privilege over settlement or judgment proceeds. Unlike in *Conkling*, little to nothing relevant would be found by deeming the privilege waived as to all communications between Cavalier's former counsel and himself on JLC's issue before the Court.

Nguyen v. Excel Corp., 197 F.3d 200 (5th Cir. 1999) involved a violation of the Fair Labor Standards Act brought by employees of Excel. The employees sought to be paid for time spent changing into protective gear necessary for their Excel duties and for time spent cleaning themselves afterwards. Excel asserted an apparent good faith defense in that it reasonably believed its actions conformed to both the FLSA and administrative practice. The following put the attorney-client privilege at issue:

> According to the employees, during depositions Excel executives could not articulate the basis of the company's good faith belief without stating their reliance upon counsel or without first taking a break in their depositions to confer with counsel. The employees contended that they were entitled to depose counsel because Excel placed at issue the knowledge of its executives when they offered

reliance on the advice of counsel as a grounds for its good faith defense.[4]

Petitioners successfully obtained an order from the trial court to depose defense counsel from which Excel appealed.

In *Nguyen*, the Court ruled that Excel had waived attorney-client privilege when it failed to "assert the attorney-client privilege when privileged information was sought," and then when "Excel selectively disclosed portions of the privileged confidential communication."[5] However, it also reduced the district court's order permitting discovery only to Excel's

> "good faith" defense including, but not limited to inquiring about advice rendered to defendant or defendant's representatives concerning the applicability of the F.L.S.A. with regard to issues pertinent to this case, the meaning of Reich v. I.B.P. and its applicability to defendant's operations, and defendant's compliance or non-compliance with the F.L.S.A. and case law interpreting the requirements of the F.L.S.A. as applicable to this case.[6]

So even though Cavalier may have disclosed certain communications in his motion concerning the alleged settlement, it is difficult to relate those, or related communications, to the claim raised by JLC's intervention. Although Cavalier may wield "a sword" in his motion and supporting memoranda and documents, it simply has not been brought to bear against JLC.

In the final three federal cases cited by JLC, the plaintiffs sought to use certain communications between themselves and their lawyers. The first two cases, like this one, involved competing motions to either enforce a settlement or motions to set aside a settlement, rather than an intervention seeking to recognize and protect an attorney's lien and privilege. Although one can assume that otherwise privileged communications were considered at the evidentiary hearings, the cases themselves fail to explicitly state so.[7] The last case cited involved the calculation of an

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[4] *Nguyen*, at 204.

[5] *Nguyen*, at 206.

[6] *Nguyen*, at 210.

[7] In Harmon v. Journal Publ. Co., 476 Fed. Appx. 756 (5th Cir. 2012), the petitioner unsuccessfully claimed that she had not given her counsel authority to settle her claim. The trial judge, in enforcing the settlement, found that

attorney fee award in an ADA claim. Again, the common theme in the cases relied on by intervenor regarding scope of the waiver is relevance, as the Court expressed in *Mark*:

> As Magistrate Judge Wilkinson correctly noted, attorney-client privilege is waived by seeking reimbursement for attorneys' fees, because Plaintiff's request 'necessarily requires plaintiff to place the reasonableness of her attorneys' work at issue.'[8]

The only legal claim raised between JLC and Cavalier are those found in her intervention, and such waiver, if any, should be limited to that sole issue at this time.[9]

B. LOUISIANA JURISPRUDENCE

Likewise, Succession of Smith v. Kavanaugh, Pierson & Talley, 513 So.2d 1138 (La. 1987) involves intervenor's pursuit of its claim. This case, similar to *Conkling*, involved an arguably prescribed legal malpractice claim and focused on when the plaintiff either knew or should have known of the malpractice. Mrs. Smith filed suit nearly fifteen years after the defendant's representation had concluded. In deposition testimony, Smith claimed that she had only learned of the malpractice when informed of such by her present attorney in August, 1984, some six months after retaining that attorney. Since current counsel's representation of the plaintiff began well before a year prior to filing suit, the defendants sought to depose current counsel as to

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Harmon had given her attorney authority to settle. In affirming the lower court, the 5th Circuit noted that "while an attorney may not settle a case without express authority, 'an attorney of record is presumed to have authority to compromise and settle litigation of his client.'" The burden, therefore, lay with Harmon to establish before the district court that there was some basis for holding that Harmon's counsel of record did not have authority to settle the litigation on her behalf and that the settlement agreement was invalid. Here Harmon simply failed to meet her burden.
Deville v. United States, 202 Fed.Appx. 761 (5th Cir. 2006) likewise involved enforcement of a settlement agreement reached after mediation. The Court noted the testimony of petitioner's former counsel who "testified that he did not block Deville's attempted exit from the mediation room and that Deville knowingly accepted the terms of the settlement.

[8] Mark v. Sunshine Plaza, Inc., 2018 U.S. Dist. LEXIS 40534 *1, * (E.D. La. 3/12/18) pgs 3-4.

[9] Both Forever Green Ath. Fields, Inc. v. Babcock Law Firm, 2014 U.S. LEXIS 416 (M.D. La. 1/3/14) and Pei-Hreng Hor v. Chu, 2010 U.S. Dist. LEXIS 112777 *1, *9-25 (S.D. Tx. 2010) stand for the general principle that the waiver is limited by relevancy. While in *Forever Green*, the waiver was much broader given the client's malpractice claim against its former attorney, the waiver was narrowed to the subject matter of notice regarding applications for patents-in-suit where communications with an attorney and affiant were discussed in an affidavit in Pei-Hreng Hor.

communications with the petitioner before the August 10 suit filing.

Although the Court found that the unfairness justifying waiver most commonly results from a privilege-holder's abuse of his privilege in three types of situations, none of those are present in any claim raised between Intervenor and Cavalier.[10] A partial, strategic disclosure of privileged communications deemed to be a waiver of privilege with respect to any withheld information about communications *on the same subject matter* would narrowly tailor any such waiver sought herein by JLC. Under the pre-trial partial disclosure scenario, the Court adopted the "anticipatory waiver theory," where courts must concern themselves "solely with whether the privilege holder has committed himself to a course of action that will require the disclosure of a privileged communication."[11]

As Smith testified in her deposition that she had no knowledge of prior counsel's malpractice before having been so informed by present counsel, Smith clearly evidenced an intent to use such disclosure by her attorney in order to defend against a peremptory exception of prescription. "Accordingly, her deposition testimony may constitute a pretrial partial disclosure of a privileged communication amounting to a waiver of her privilege as to relevant communications with her attorney on the same subject."[12] Contrast that reasoning with what Cavalier has not done, namely disclose, partial or otherwise, any communication relevant to the relief sought by Intervenor.

In State v. Jennings, 304 So.3d 507 (La. App. 2020), the Third Circuit had to determine

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[10] Succession of Smith v. Kavanaugh, Pierson & Talley, 513 So.2d 1138, 1143-44 (La. 1987) Those situations are: (1) "partial disclosure"--a strategic introduction into evidence of only part of a larger class of privileged material; 3 (2) "pretrial partial disclosure"--a pretrial disclosure of privileged communication indicating a decision to rely on privileged evidence at trial; and (3) "placing privileged communications at issue"--an affirmative pleading of a claim or defense that inevitably requires the introduction of privileged communications.

[11] *Smith*, at 1146.

[12] *Smith*, at 1146.

whether trial counsel's testimony regarding the client's understanding of a plea agreement at an evidentiary hearing was proper. Given that Jennings' pleadings raised an ineffective assistance of counsel's claim, in which he accused

> trial counsel of ineffective assistance and railroading him into accepting a guilty plea that he did not understand, it required testimony from defense counsel regarding his discussions with Defendant and his appreciation of Defendant's understanding of the plea for Defendant to prove his claims.[13]

Jennings himself placed the otherwise privileged communication(s) at issue. As such, the Court found that "the defendant waived any claim of privilege regarding his conversations with Mr. McCann about the plea agreement."[14]

Once again, Cavalier has not put any of his communications, partial or otherwise, at issue that relate to the relief sought by intervenor.

CONCLUSION

Simply put, the only issue raised by JLC's intervention is the recognition and protection of its lien and privilege. Relevancy is a theme that flows throughout all the cases cited herein. In orders deeming the privilege waived, the waiver is tied to the relevancy of issues before the court.[15] The waivers must also be tailored to communications on the same subject matter of the issue in controversy between the parties. While Cavalier may be simply delaying a fight over privileged communications to a later date, JLC can point to no proverbial dog it has in its fight with Cavalier and raised by its pleadings to warrant this Court deeming his attorney-client privilege waived. It begs the question then, what relevance are the otherwise privileged communications between JLC and Cavalier to this claim?

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[13] *Jennings*, at 314-315.

[14] *Jennings*, at 315.

[15] In *Conkling*, it was limited to the issue of when Conkling knew or should have known information in an agreement was false which was relevant to whether his claim was time barred; in *Nguyen* it was related to Excel's affirmative defense of "good faith."

WHEREFORE, Carl Cavalier prays that the Court will deny Intervenor's Motion to Deem Privileged Waived or, in the alternative, limit such waiver to those communications it deems relevant to JLC's issue before this Court.

RESPECTFULLY SUBMITTED:

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of February, 2023, a copy of the foregoing pleading was filed electronically with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to counsel for Defendants, by operation of the Court's electronic filing system.

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